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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision : 07.03.2012

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FAO (OS) No.82 of 2011

TRIPAT KAUR SANDHU & ORS.

..... Appellants

Through: Mr. Manish Sharma & Ms. Shivanshi Gupta,
Advs.

Versus

VIJAY GUPTA & ANR.

..... Respondents

Through: Mr. D.K. Rustagi, Mr. Arpit Bhargava &
Mr. B.S. Bagga, Advs. for R-1 with R-1 in
person.
None for Respondent No.2.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

SANJAY KISHAN KAUL, J.

1. Mr. Vijay Gupta (respondent No.1 herein) filed a suit for specific performance, declaration, permanent & mandatory injunction as well as a decree of damages in the alternative against Shri Gursharan Singh Sandhu (for short 'GSS')/respondent No.2 in respect of flat No.113, 1st Floor, New Delhi House, Plot No.27, Barakhamba Road, New Delhi-110001 admeasuring 872 sq.ft. (hereinafter referred to as the 'suit property'). Respondent No.1 alleged that GSS has represented himself as the owner of the flat and agreed to sell the same to him for a total consideration of ₹38,80,400.00, amount being calculated @ ₹4,450.00 per sq.ft. Respondent No.1 paid a sum of ₹1.00 lakh in cash as part payment to GSS for which a receipt was executed (Exhibit P-1), which reads as under:

“RECEIPT

Received Rs.1,00,000/- (Rupees One lac only) by cash as payment from Mr. Vijay Gupta S/o Sh. Narinder Pal Azad R/o 497, Sector 16A, Faridabad against the sale of our flat No.113, situated at 1st Floor, New Delhi House, 27, Barakhamba Road, New Delhi-110001 admea^{su}ring 872 sq.ft. for total consideration of Rs.38,80,400/- (@Rs.4,450/- per sq.ft.). Sellers shall pay all dues upto the date of agreement along with transfer charges payable to builder.

Date: 27th March, 2004 (GURSHARAN SINGH SANDHU)
S/o Late Sh. Harcharan Singh Sandhu
R/o 173, SeCtor-19A, Chandigarh.

1. Sd/-
Pavan Kumar
807, Rohit House,
3, Tolstoy Marg,
New Delhi-1.
- 2 Sd/-
Mahesh Goel S/o Sh. R.N. Goel
369/16A
Faridabad.”

2. As per the receipt GSS was to pay all the dues up to the date of the agreement along with transfer charges payable to the builder. The receipt is witnessed by Shri Pavan Kumar and Shri Mahesh Goel. The plaint states that the transaction was to be completed within two (2) months or soon thereafter, after obtaining necessary permissions and clearances and the balance amount was payable on receipt of possession as per the said understanding though not evidenced in the receipt. Respondent No.1 contacted GSS on 15.5.2004 before the expiry of the said period informing that he has made arrangement for the entire sale consideration but was informed that the permissions/clearances had not been obtained.

Despite number of endeavours of respondent No.1 and his readiness and willingness to perform the obligations for sale of the property, the transaction was not completed but on the other hand he came to know that GSS was attempting to sell the flat to some other person at a higher price. This resulted in filing of the suit for specific performance and in the alternative for recovery of ₹25.00 lakh towards compensation, including advance paid along with interest @ 24 per cent per annum. The suit was filed on 7.7.2004.

3. It may be noticed that the index of the suit referred to “Shri Gursharan Singh Sandhu & Ors.” as “defendants” but only one defendant “Gursharan Singh Sandhu” was impleaded. The plaint also in some places referred to “defendants” despite there being one defendant. The significance of this came to light when the written statement was filed by GSS. GSS pleaded that he was not the sole owner of the property and that respondent No.1 had been informed that he would have to take consent of other co-owners and the Flat-Buyers’ Agreement dated 27.10.1976 was shown to respondent No.1 which recorded the names of all the co-owners, being Lt. Col. Harcharan Singh Sandhu, Harcharan Singh Sandhu (HUF), Tripat Kaur Sandhu, Master Gursharan Singh (Minor) and Kumari Roopan Sandhu (Minor). It was, thus, pleaded that there was no completed agreement to sell, GSS being owner of only part of the property. Harcharan Singh Sandhu (for short ‘HSS’) had passed away and his personal share devolved on two heirs, viz., his wife and GSS his son as per a Will. The HUF share of late HSS devolved on GSS and his mother. The knowledge of this fact is attributed to respondent No.1 and since all the parties were not ad idem on sale, GSS was willing to return the amount received by

him with whatever interest the Court determined. This written statement was filed on 23.10.2004 with advance copy served on learned counsel for the plaintiff (respondent No.1 herein) on 14.10.2004. Respondent No.1 thereafter filed his replication. The admission/denial of documents was completed and the issues were framed on 7.3.2005. The list of witnesses was directed to be filed vide that order within two (2) weeks with affidavits of witnesses of the plaintiff (respondent No.1 herein) to be filed within six (6) weeks thereafter and the suit was listed for cross-examination of the witnesses of the plaintiff before the Joint Registrar on 19.7.2005.

4. Plaintiff/respondent No.1 filed a list of witnesses naming three witnesses including respondent No.1, whose cross-examination was concluded as PW-1 on 27.10.2005 when further time was sought to produce two remaining witnesses. However, respondent No.1 filed IA No.6338/2006 under Order 1 Rule 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'said Code') seeking to implead Ms. Tripat Kaur, wife of late HSS and mother of GSS; Ms. Roopam Kaur Sandhu, daughter of late HSS as also the HUF as defendants. This application was not opposed and was allowed on 22.4.2008. On the same date the restraint order dated 8.7.2004 granted in favour of the plaintiff/respondent No.1 qua the suit property was also made absolute by consent. The matter was thereafter notified for possible settlement on various dates but no settlement matured. Written statement was also filed by the three defendants (appellants herein) on 2.3.2009. On 21.4.2010, the Joint Registrar recording evidence noted that opportunities had been taken for the plaintiff to produce the remaining evidence and,

once again, adjournments have been sought. The last and final opportunity was granted to the plaintiff/respondent No.1 herein to produce the evidence subject to costs of ₹20,000.00. Despite this no further evidence was produced and the evidence of the plaintiff was closed on 18.5.2010. The suit was listed for defendant's evidence on 16.8.2010.

5. Respondent No.1 filed IA No.10750/2010 seeking recall of the order dated 18.5.2010 but this application was dismissed by the Joint Registrar on 16.8.2010. On the same date DW-1 was partly cross-examined subject to the right reserved by the plaintiff/respondent No.1 herein to take recourse against the order dated 18.5.2010 and 16.8.2010. Thereafter OA No.64/2010 was filed assailing the order dated 18.5.2010 and 16.8.2010. The prayer was partly allowed by the learned single Judge on 9.12.2010 in terms whereof subject to the plaintiff/respondent No.1 herein depositing the costs imposed on 21.4.2010 and further payment of ₹5,000.00 to each of the defendants, last and final opportunity was granted to the plaintiff/respondent No.1 herein to produce all his witnesses before the Joint Registrar on 18.1.2011, date fixed for cross-examination of DW-1 with a clear direction that no further opportunity will be given.
6. It is in the conspectus of the aforesaid facts that IA No.652/2011 was filed under Section 114 read with Section 151 of the said Code seeking modification of the date for completion of plaintiff's evidence. This was preceded by filing IA No.10268/2010 under Order 6 Rule 17 read with Section 151 of the said Code. IA No.652/2011 was disposed of on 18.1.2011 when IA No.10268/2010 was allowed. The amendment was permitted

subject to payment of ₹25,000.00 as costs. It is the latter order which has been assailed in the present appeal.

7. The learned single Judge in terms of the impugned order found that in IA No.6338/2006 under Order 1 Rule 10 of the said Code filed by the plaintiff/respondent No.1 herein while seeking impleadment of other three defendants(appellants herein) it has pleaded that GSS/respondent No.2 had executed the agreement-cum-receipt dated 27.3.2004 as the sole representative of the entire body of ownership and that the co-ownership had been in the knowledge throughout. The plaintiff/respondent No.1 had also sought leave of the Court to make all consequential amendments in the plaint. IA No.10268/2010 now sought to amend paragraphs 2 & 3 of the plaint seeking to allege that respondent No.2 herein is one of the co-owners and authorized representatives of the co-owners and, thus, the defendants are liable and responsible for performance of the agreement. Similarly in paragraph 3 of the plaint it is sought to be alleged that respondent No.2 herein was an authorized representative of the other defendants. The learned single Judge concluded that a reading of the averments in the two applications showed that the plaintiff/respondent No.1 ought to have moved both the applications together and there was substantial delay in seeking the proposed amendments but considering the fact that necessary averments constituting the foundation of the claim of the plaintiff seeking specific performance had already been made at the time when the claim against the defendants was within the prescribed period of limitation, no prejudice would be caused if the proposed amendment is allowed. Thereafter the learned single

Judge proceeded to discuss the various judgements on the principle dealing with such amendments.

8. Learned counsel for the appellants assailed the said judgement while learned counsel for respondent No.1 sought to defend the same. On hearing learned counsels for the parties, we find the impugned order unsustainable.
9. A perusal of the receipt shows that it was executed by GSS/respondent No.1 alone and it is not executed on behalf of other co-owners. However, the last sentence of the receipt uses the words “the sellers” qua payment of all dues up to the date of agreement along with transfer charges to the builder. It is on this basis that learned counsel for respondent No.1 stated that the receipt shows that there were more than one owners and the needful had to be done by “the sellers”. In our considered view, in a sense the plea is contradictory in itself as, on the one hand, respondent No.1 sought to implead only GSS/respondent No.2 as the sole defendant in the original suit while on the other hand now claims knowledge of the fact that there were more than one owners. If this is true, the original plaint itself should have impleaded all the co-owners. This was not done. GSS/respondent No.2 took specific plea in the written statement of there being co-ownership, a copy of which was given to learned counsel for the plaintiff/respondent No.1 on 23.10.2004. Despite this no steps were taken but, on the other hand, the appellant proceeded to file a replication denying that GSS/respondent No.2 had ever informed the plaintiff/respondent No.1 of not being the sole owner. In fact, it has been categorically stated in paragraph 1 of the reply of preliminary objections that “it is reiterated that the defendant

represented to the plaintiff that he is the sole owner of the property”. As stated this is completely contradictory to the plea subsequently taken before us.

10. The testimony of the plaintiff/respondent No.1 was recorded and his cross-examination was also concluded on 27.10.2005. It is thereafter that the plaintiff/respondent No.1 woke up and sought to implead the other co-owners as parties vide IA No.6338/2006 alleging that it is only when the written statement was filed that the name of the title holders came to the notice of the plaintiff/respondent No.1. It was again pleaded that GSS/respondent No.2 entered into the transaction as a sole representative of the entire body of ownership and that the other co-owners had knowledge of the suit. The plaintiff only sought impleadment of the three defendants without seeking any other amendment though he craved leave of the Court to make all consequential changes in the plaint required in that behalf. It was specifically stated that “there is no amendment being sought except strictly as a consequence of the above three defendants”. The net effect of this, in our considered view, would be that the reference to the sole defendant would in turn be now reference to all the defendants.
11. Thereafter the written statement has been filed by the present appellants as defendants 2 to 4, pleadings were completed and the plaintiff’s evidence as a whole concluded on 18.5.2010.
12. In our considered view, the amendment now sought to be made by the impugned order seeks to take the case of the plaintiff/respondent No.1 further by alleging that GSS/respondent No.2 was acting on behalf of all the other co-owners. This is

specifically keeping in mind the stand in the original plaint and the replication that the plaintiff/respondent No.1 did not even have knowledge of there being any other co-owners much less GSS/respondent No.2 acting on their behalf.

13. We cannot lose sight of the significance of the legislative amendment in the provisions of Order 6 Rule 17 of the said Code brought about by the Act 22 of 2002 w.e.f. 1.7.2002. The provision now reads as under:

**“ORDER VI
PLEADINGS GENERALLY**

17. Amendment of pleadings.-

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

(emphasis supplied)

14. The addition of the proviso is significant as no application for amendment is to be allowed after the trial has commenced unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. It is the salutary provision brought in by the legislature in its wisdom to prevent unnecessary prolongation of the suits on the pretext of making amendments to the pleadings.

15. The principles governing amendment to pleadings post-insertion of the proviso have been discussed in Rajkumar Gurawara (Dead) Through LRs v. S.K. Sarwagi and Company Private Limited & Anr., (2008) 14 SCC 364. The facts are slightly apposite as the plaintiff claimed exclusive mining rights in the suit lands despite having notice of the plea of the original defendant / State Government that the land had been leased out to respondent No. 1 company (which was impleaded as defendant No. 2 later). In the written statements of both the State Government and respondent No. 1 company, the stand that the suit property was leased out to respondent No. 1 company upto 1.6.2009 was affirmed and reiterated. However, the appellant and plaintiff chose to lead evidence and after commencement of trial during the course of arguments came up with the idea of amending his plaint under Order VI Rule 17 of the said Code. It was held that the prayer for amendment was liable to be rejected. In the present case also, either respondent No. 1 had knowledge of the fact earlier as is sought to be pleaded now or at least derived knowledge after filing of the written statement when a copy was handed over to his counsel on 14.10.2004, but despite that proceeded to trial after denying the factum of any such prior knowledge in his replication consistent with his plea in the plaint. Thus, if an amendment was to be sought, the cause for the same arose on that date. Instead, issues were framed on 7.3.2005, affidavit of evidence was filed by the plaintiff / respondent No. 1 and his cross-examination was also completed on 27.10.2005. The judgments referred to by the learned Single Judge interestingly all pertain to a period when the proviso had not been inserted by the Legislature and, thus, the

effect of the insertion of the proviso, noticed herein-above, has not been appreciated by the learned Single Judge.

16. The plaintiff/respondent No.1 conscious of the limitations brought in by the proviso of Order 6 Rule 17 of the said Code and knowing the impediments which he would face in seeking an amendment as it could not be said that despite due diligence the matter could not have been raised before trial, sought only a limited relief under Order 1 Rule 10 of the said Code.
17. We may add here that for the first time in the said application, the plaintiff/respondent No.1 sought to slip in the allegation that GSS/respondent No.2 was acting on behalf of the other co-owners while the fact is that he had denied knowledge of any such ownership at the time of execution of the receipt specifically in the replication. Thus, all that was sought to be added was the name of the co-owners which was agreed to by consent and the consequential amendments in the plaint would, thus, be only that the word “defendant” would read as “defendants”. The plea of such authorization to act on behalf of the co-owners was never sought to be incorporated in the plaint as there would have been impediment in the way of the plaintiff/respondent No.1 even on that date as the recording of evidence had commenced.
18. The conduct of the plaintiff/respondent No.1 is apparent from the fact that despite taking time he failed to produce his evidence and, thus, the defendants’ evidence commenced and even part cross-examination of GSS/respondent No.2 took place. The plaintiff/respondent No.1 was thereafter granted last opportunity to produce his remaining evidence subject to additional costs on the date fixed before the Joint Registrar for further cross-examination

of GSS/respondent No.2. It is at that stage that IA No.10268/2010 was filed now to seek amendment of the plaint by seeking to raise a specific plea of such authorization/representation of GSS/respondent No.2 on behalf of other co-owners.

19. It can, thus, hardly be said that such a case would not be hit by the proviso of Order 6 Rule 17 of the said Code as it cannot be said that despite due diligence the plaintiff/respondent No.1 could not have pleaded the said fact which had already come to his knowledge on the copy of the written statement being handed over to him.
20. Now the conflicting plea raised is that he already knew about the existence of co-owners as GSS/respondent No.2 sought to act on behalf of other co-owners and was their authorized representative! Such an amendment would not have been permissible even when the application under Order 1 Rule 10 of the said Code was filed as the recording of evidence had commenced after a lapse of a year and a half from such fact coming to the notice of plaintiff/respondent No.1. Thus, what could not have been permitted on 22.4.2008 when IA No.6338/2006 was allowed cannot now be permitted by allowing IA No.10268/2010 by the impugned order dated 18.1.2011.
21. In view of the aforesaid, we may also look to the matter from another perspective. The plea that respondent No. 1 / plaintiff had no prior knowledge of co-ownership of the property and this fact was concealed from him by GSS is destructive of the plea that such fact was to the knowledge of respondent No. 1 / plaintiff and that GSS assured respondent No. 1 that he was acting as an authorized representative of the other co-owners of the flat. Both factual

situations cannot stand together. It is not a case of an alternative plea, but of mutually repugnant, contradictory and destructive of each other. In M/s. Modi Spinning & Weaving Mills Co. Ltd. & Anr. v. M/s. Ladha Ram & Co., (1976) 4 SCC 320, it was held that inconsistent pleas may be made in pleadings, but they cannot displace the plaintiff completely from the admissions made by the defendants in the written statement as it would irretrievably prejudice the plaintiff by denying him the opportunity of extracting the admission from the defendants. Similarly, in Shrimoni Gurdwara Committee v. Jaswant Singh, (1996) 11 SCC 690, it has been observed that though mutually inconsistent pleadings in the written statement can be raised, they cannot be mutually destructive. In the original written statement, the title of the father of the defendant was denied, it was, thus, held that by amendment, the plaintiff could not set up a title in him and plead gift by the father in favour of the plaintiff. In Sarva Shramik Sangh v. Indian Oil Corpn. Ltd., (2009) 11 SCC 609 = AIR 2009 SC 2355, while holding that there is no absolute bar of inconsistent pleas, it was held that it was impermissible to take inconsistent plea by way of amendment thereby denying the either side the benefit of admission contained in the earlier pleadings. Mutually repugnant and contradictory pleas, destructive of each other were held not to be permitted to be urged simultaneously. In the present case, the original case as set up in the plaint and as reiterated in the replication after the written statement was filed by the original defendant is that there was no disclosure of co-ownership and GSS professed title to himself alone. By the amendment, this portion has been deleted in the amended plaint on record and is sought to

be substituted by a plea of GSS being one of the co-owners and the authorized representative of other co-owners and presenting himself as such to respondent No. 1. The initial endeavour of adding the appellants as parties post-commencement of trial was made keeping in mind the fact that since the property was co-owned, a decree may not be executable, unless all co-owners were parties. It is in this context that the application was confined to impleadment of the appellants as parties and not seeking any other amendment conscious of the limitation arising from the trial having commenced and the proviso to Order VI Rule 17 of the said Code being in place.

22. The prayer to make consequential amendments to the plaint by filing of the application under Order 1 Rule 10 of the said Code was, in fact, only in terms of Order 1 Rule 10 sub-rule 4 of the said Code which provides for the amendment to be made in the plaint as may be necessary as a sequitur to the addition of the parties and reads as under:

**“ORDER I
PARTIES TO SUITS**

10. Suit in name of wrong plaintiff—

....
(4) Where defendant added, plaint to be amended --Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.”

The effect of the aforesaid, thus, was that the expression ‘*defendant*’ was to read as ‘*defendants*’ and not that a mutually destructive fact was to be inserted.

23. We must note in the end that there appears to be a persistent endeavour of the plaintiff/respondent No.1 to prolong the suit as he has created a clog on the property and has an injunction in his favour qua the suit property. Thus, on one pretext or the other the suit is sought to be prolonged, contradictory pleas taken and amendments sought in violation of the proviso of Order 6 Rule 17 of the said Code. The legislative amendment by incorporation of the proviso seeks to prevent such a mischief.
24. We, thus, allow the appeal and set aside the impugned order dated 18.1.2011. The appellant shall also be entitled to costs of ₹10,000.00 from respondent No.1.

SANJAY KISHAN KAUL, J.

MARCH 07, 2012
madan/b'nesh

RAJIV SHAKDHER, J.